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Climate, Energy, & Air Update Weeks of January 1 – 15, 2014

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White House announces Quadrennial Energy Review . . . Omnibus spending bill is on the move in Congress; includes some energy-related riders . . . EPA proposed rule to set greenhouse gas emission standards for new power plants is published in the Federal Register, triggering 60-day comment period . . . Senate Environment & Public Works Committee will hold hearing on President's Climate Action Plan . . . House passes bill changing financial responsibility requirements for entities managing hazardous waste . . . Judge allows lawsuit to go forward alleging that coal dust from rail cars violates Clean Water Act . . . DOJ will not appeal recent decision imposing 5-year statute of limitations on enforcement actions alleging past NSR violations.

Executive Branch

- **White House Announces Quadrennial Energy Review.** On January 9, President Obama announced the establishment of a Quadrennial Energy Review, a roadmap to help address the challenges of transformations in the energy sector, including aging infrastructure; climate change; and cyber and physical threats. The Review will evaluate existing energy policy and provide recommendations for Executive and Legislative Branch actions. The Review will be conducted by an interagency task force, co-chaired by the Director of the Office of Science and Technology Policy and the Director of the Domestic Policy Council. The Secretary of Energy will provide support to the task force as first among equals in the energy policy arena. The first report is to be delivered by the end of January, 2015. The Presidential Memorandum establishing the review is available at <http://www.whitehouse.gov/the-press-office/2014/01/09/presidential-memorandum-establishing-quadrennial-energy-review>.
- **EPA Formally Proposes Power Plant CO₂ New Source Performance Standards (NSPS).** On January 8, EPA formally issued its proposed CO₂ NSPS for power plants through publication in the Federal Register. The long-awaited proposal, which had been informally released on September 20, would establish separate standards for certain types of natural gas-fired combustion turbines (at 1100 lbs. CO₂ per MWh or 1000 lbs. per MWh, depending on facility size), and for coal-fired electric utility boilers,

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including integrated gasification combined cycle (IGCC) units (at 1100 lbs. CO₂ per MWh, based on partial application of carbon capture and storage (CCS) technology). The comment deadline is March 10. The full proposal is available at

<https://www.federalregister.gov/articles/2014/01/08/2013-28668/standards-of-performance-for-greenhouse-gas-emissions-from-new-stationary-sources-electric-utility> For a more comprehensive description of the proposal, see the complete VNF update at: <http://www.vnf.com/1032>.

- **Department of State Outlines Plan to Meet UN Climate Pledge.** On January 2, the Department of State submitted its 2014 Climate Action Report to the United Nations Framework Convention on Climate Change, summarizing past actions the United States has made to reduce emissions and outlining how the United States will meet its Copenhagen carbon reduction pledge going forward. Under agreements reached at the Fifteenth Conference of Parties, held in Copenhagen in 2010, the United States pledged to cut emissions 17 percent below 2005 levels by 2020 and to submit biennial reports outlining its progress. President Obama's June 2013 Climate Action Plan forms the basis of U.S. commitments in the State Department report. While legislative action was explicitly contemplated when the United States made its initial pledge in 2010, the 2014 Report does not include any assumed action by Congress. The Report is available at <http://www.state.gov/documents/organization/219038.pdf>.
- **EPA Proposes Rule Limiting Emissions From Wood Stoves.** On January 3, EPA issued a proposed rule limiting emissions of particulate matter (PM) from residential wood heaters, fireplace inserts, hydronic boilers, and wood burning masonry heaters. These standards would not apply to fireplaces, pizza ovens, barbecues, and chimineas. Unlike the majority of New Source Performance Standards, this proposed rule would require manufacturers to certify stoves and heaters to certain emission levels. Under the proposal, 2015 model-year stoves must emit less than 4.5 g PM per hour, with the emissions limit decreasing to 1.3 g PM per hour by 2018. EPA will take comments for 90 days. More information including the proposal is available at <http://www2.epa.gov/residential-wood-heaters/proposed-new-source-performance-standards-residential-wood-heaters>.
- **EPA to Miss Cooling Water Intake Rule Deadline.** Despite a court-ordered deadline of January 14, EPA has not yet issued the highly-anticipated final cooling water intake rule. This rule, promulgated under Section 316(b) of the Clean Water Act (CWA), would set standards for hundreds of power plants and industrial facilities that have cooling water intake structures to limit impacts on fish and other aquatic life. This will be the fifth extension since a 2010 settlement agreement committed the agency to issue a final rule by July 27, 2012. EPA had previously invoked a provision of its settlement agreement with Riverkeeper and other environmental groups to delay issuing a final rule due to the November 2013 government shutdown and had further extended the deadline to January 14, 2014 upon agreement with environmental plaintiffs.

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- **Department of Energy Funding Announcements and Solicitations**
 - **DOE Funds Louisiana Carbon Capture and Sequestration (CCS) Project.** The Department of Energy announced its decision to move forward in providing \$261.4 million in funding to Leucadia Energy LLC for its proposed CCS project in Lake Charles, LA. The project will capture CO₂ from a gasification plant and transport it to a nearby oil field for use in commercial enhanced oil recovery. DOE's Record of Decision is available at <http://energy.gov/nepa/downloads/eis-0464-record-decision>.
 - **DOE Seeking Applicants for Advanced Technology Vehicle Manufacturing Loan Guarantees.** The Department of Energy has reopened applications for its Advanced Technology Vehicle Manufacturing (ATVM) program, which has been slowly disbursing loan guarantees to auto companies and suppliers developing more efficient vehicles. The program currently has over \$16 billion in unused appropriations. Details on the program can be found at <http://lpo.energy.gov/programs/atvm/>.
- **In Late-Breaking 2013 Developments...**
 - **EPA Invalidated 33 Million Renewable Identification Numbers (RINs).** In another case of RIN fraud, EPA issued a notice of violation to two biodiesel companies for allegedly selling 33.5 million invalid RINs, credits used by refiners to comply with the renewable fuel standard. These invalid RINs were sold between 2010 and 2011. The refiners that purchased them will likely be required to acquire valid RINs from the current market.
 - **EPA Issues Rule and Guidance Exempting Captured and Sequestered CO₂ From RCRA Regulation.** In December, 2013, EPA issued a final rule and accompanying draft guidance that exempts CO₂ captured from power plants and other industrial sources and injected into certain underground wells – those approved for such injection as “Class VI wells” under the Safe Drinking Water Act – from being designated as “hazardous waste” under the Resource Conservation and Recovery Act (RCRA). This rule and guidance are meant to increase regulatory certainty for CCS projects. In a clarification from the proposed rule, EPA stated that this exemption applies only to Class VI wells meant for underground storage of CO₂, not Class II wells used for enhanced oil recovery. EPA's draft guidance also proposes to clarify that CO₂ injected in depleted oil and gas wells previously classified as Class II for the purpose of long-term storage must be reclassified as Class VI, unless EPA determines there is no risk to drinking water. The final rule (available at <https://www.federalregister.gov/articles/2014/01/03/2013-31246/hazardous-waste-management-system-conditional-exclusion-for-carbon-dioxide-co2>) was published in the Federal Register on January 3, 2014. Comments are due by March 1. The draft guidance document is available at <http://water.epa.gov/type/groundwater/uic/class6/upload/epa816p13004.pdf>.

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- **President Obama Announces Environmental Nominations.** President Obama nominated Janet McCabe to be the EPA's Assistant Administrator for Air and Radiation. Ms. McCabe has been serving in this position on an acting basis since then-assistant administrator Gina McCarthy was confirmed by the Senate to lead the agency in July 2013. In addition, President Obama nominated John Cruden, current president of the Environmental Law Institute, to be Assistant Attorney General for the Environment and Natural Resources – the DOJ's top environmental lawyer. The Senate has not yet acted on these nominations.

Legislative Branch

- **Baucus Appointment Creates Chairmanship Shuffle.** On December 18, President Obama nominated Sen. Max Baucus (D-MT) to be the next U.S. Ambassador to China. If confirmed by the Senate, his departure will leave the gavel of the Senate Finance Committee vacant, triggering a ripple effect at other Committees. Senate Energy and Natural Resources Committee Chairman Ron Wyden (D-OR) is next in line to take the chair of the Finance Committee. If Wyden becomes Chair of the Finance Committee, Sen. Mary Landrieu (D-LA) is next in line to chair the Energy and Natural Resources Committee.
- **Murkowski Focuses on Energy Exports.** On January 7, Senate Energy and Natural Resources Committee Ranking Member Lisa Murkowski (R-AK) released a white paper entitled "A Signal to the World: Renovating the Architecture of US Energy Exports." This document is the third white paper following publication of *Energy 20/20: A Blueprint for America's Energy Future*. This third white paper seeks to "educate and recommend" policies to boost energy exports. The full document is available at http://www.energy.senate.gov/public/index.cfm/files/serve?File_id=546d56f0-05b6-41e6-84c1-b4c4c5efa372
- **Senators Introduce Amendment to Block EPA Rules.** On January 8, Senators James Inhofe (R-OK) and Roy Blunt (R-MO) introduced S. Amendment 2615 to S. 1845, the "Emergency Unemployment Compensation Extension Act." The amendment would block EPA from taking any new regulatory action until it completes and publicizes "an accounting of the negative effects of current Clean Air Act rules." The Senate has postponed debate on S. 1845 in order to begin consideration of the Fiscal Year 2014 Omnibus Appropriations bill (additional information below). The Senate may return to S. 1845 after the Congressional recess scheduled to begin on Friday, January 17 and conclude on January 27.
- **House Passes Bill to Change Requirements on Hazardous Waste Disposal.** On January 9, the House passed H.R. 2279, the "Reducing Excessive Deadline Obligations Act of 2013", by a vote of 225 to 188. Sponsored by Rep. Cory Gardner, H.R. 2279 would amend the Comprehensive Environment Response, Compensation, and Liability Act (CERCLA) to remove a requirement that EPA review regulations every three years, and replace this obligation with a requirement that EPA review regulations only "as appropriate." In addition, the bill would require EPA to submit a report to Congress before establishing any new financial responsibility

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requirements for owners of certain facilities that manage or dispose of hazardous waste. Furthermore, the bill would prohibit such financial responsibility requirements from preempting other existing state or federal requirements. The text of the bill is available at <http://docs.house.gov/meetings/IF/IF00/20130618/101026/BILLS-1132279ih.pdf>.

- **House Passes Bill on Vehicle Emissions Regulations.** On January 9, the House also passed H.R. 724 by a vote of 405 to 0. Sponsored by Rep. Bob Latta (R-OH), H.R. 724 would amend the Clean Air Act to remove the requirement for dealer certification of new light-duty motor vehicles, and would remove a redundant requirement for certification. The text of the bill is available at <http://docs.house.gov/meetings/IF/IF00/20131210/101595/BILLS-113HR724ih-HR724abilltoamendtheCleanAirActtoremovetherequirementfordealercertificationofnewlight-dutyvehicles.pdf>.
- **Bipartisan Duo Introduce Bill Affecting EPA's Power Plant NSPS.** On January 9, Sen. Joe Manchin (D-WV) and Rep. Ed Whitfield (R-KY) introduced S. 1905 and H.R. 3826, the "Electricity Security and Affordability Act." The bills would prohibit EPA from promulgating greenhouse gas (GHG) emission standards for new coal-fired power plants unless the agency: 1) establishes separate standards for natural gas- and coal-fired plants; 2) bases the standards for the coal category on levels that have been achieved over a one-year period by at least 6 units located at different commercial power plants in the United States; and 3) establishes a subcategory for coal-fired plants that use lignite coal and bases those standards on emission levels that have been achieved over a one-year period by at least 3 units located at different commercial power plants in the United States. The bills would also prohibit EPA from promulgating any rule establishing GHG emission standards or guidelines for modified, reconstructed, or existing plants unless and until a federal law is enacted specifying the effective date. Additional information is available at <http://energycommerce.house.gov/factsheet/whitfield-manchin-discussion-draft-plan-keep-american-electricity-affordable-and-reliable#sthash.fhmVjsYa.dpuf>
- **House Committee Holds Hearing on Stream Buffer Rule.** On January 9, the House Natural Resources Committee held a hearing entitled "The Obama Administration War on Coal: The Recent Report by the Office of the Inspector General." The hearing was a continuation of the Committee's investigation of the Office of Surface Mining Reclamation and Enforcement's 2008 rewrite of the Stream Buffer Rule. Robert Knox, the Interior Department's Assistant Inspector General, was the only witness. Additional background information and webcast of the hearing are available at <http://naturalresources.house.gov/calendar/eventsingle.aspx?EventID=365240>.
- **House Subcommittee Holds Hearing on Outer Continental Shelf (OCS) Development in the Atlantic.** On January 10, the House Natural Resources Subcommittee on Energy and Mineral Resources held a hearing entitled "The Science Behind Discovery: Seismic Exploration and the Future of the Atlantic OCS." According to committee-issued documents, the hearing was intended to focus on the "cutting edge technology currently used in the field of seismic research and the fundamentally important role seismic research plays in moving forward with future offshore energy development in the Atlantic Outer Continental Shelf (OCS)." Democrats on the Committee urged the Administration to learn from the BP oil spill. A full list of witnesses,

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additional background information and a webcast of the hearing are available at <http://naturalresources.house.gov/calendar/eventsingle.aspx?EventID=363692>

- **Senate Committee Plans Climate Hearing.** The Senate Environment and Public Works Committee announced plans for a January 16 hearing entitled “Review of the President’s Climate Action Plan.” Witnesses will include EPA Administrator Gina McCarthy and CEQ Administrator Nancy Sutley. A full list of witnesses and official announcement of the hearing are available at http://www.epw.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=e07101a7-0715-7690-b6e9-c39e56a3b468
- **Congress Sets Up Vote on FY 14 Appropriations.** On January 13, House and Senate Appropriations Chairs announced an agreement on all 12 appropriations bills for Fiscal Year 2014. The Energy and Water section of the bill provides approximately \$34 billion, an increase of \$777 million above the enacted 2013 level. Among other things, the bill provides \$562 million for research and development to advance coal, natural gas, oil, and other fossil energy technologies, an increase of \$28 million (5.3%) above the fiscal year 2013 enacted level and \$141 million (34%) above the President’s request; and \$1.9 billion for “energy efficiency and renewable energy programs.” The bill does include several policy provisions, including a ban on funding implementation of the phase-out of incandescent light bulbs, a limit on new mountaintop mining regulations, and a halt to the Ex-Im Bank’s proposed rule to restrict financing for US manufacturers for certain coal-fired power plants in other countries. The House is expected to vote on the bill as soon as January 15. The Senate is expected to follow suit on Saturday. Both House and Senate leadership announced that there will be no opportunities for amendments. The text of the bill and Committee-issued summaries are available at <http://appropriations.house.gov/news/documentsingle.aspx?DocumentID=366721> and the Joint Explanatory Statement is available at <http://64.106.168.122/webfiles/govdoc-4406736.pdf>.

Judicial Branch

- **Federal Judge Declines to Dismiss Lawsuit Alleging that Railroad Car Coal Dust Violates Clean Water Act.** On January 2, a Federal District Court judge in the Eastern District of Washington denied a motion to dismiss a lawsuit against the BNSF Railway Company, which means that the lawsuit may proceed to trial. *Sierra Club v. BNSF Railway*, E.D. Wash., No. 13-cv-00272. The complaint, which was filed on July 24, 2013, alleges that BNSF violated the Clean Water Act (CWA) by discharging coal dust from its rail cars into waters of the United States without a permit. Under the CWA, any discharge of pollutants from a “point source” into waters of the United States must comply with a National Pollutant Discharge Elimination System (NPDES) permit. If the plaintiffs are successful, railways might need to obtain a NPDES permit for each rail car carrying coal, instead of one permit for the entire train. The environmentalist petitioners claim that coal was found in almost all the samples tested from water bodies located near railroad crossings, and that the railroads themselves have estimated that a single train can lose as much as 60,000 pounds of coal during a trip. The court rejected BNSF’s argument that rail cars are not “point sources.” The court equated rail cars to mines and fertilized agricultural fields – both of which have been found to constitute “point sources.” The court found it

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“necessary to allow Plaintiffs the opportunity at this early juncture to develop facts that will allow their claims to either stand or fail, based on the statutory definition of a point source discharge.”

- **Department of Justice Will Not Petition the Supreme Court to Review a Ruling Limiting EPA’s Enforcement.** The Department of Justice (DOJ), on behalf of EPA, allowed a December 20 deadline to pass for filing a petition for a *writ of certiorari* asking the U.S. Supreme Court to review the U.S. Court of Appeals for the Seventh Circuit’s (Seventh Circuit) decision in *United States, et al. v. Midwest Generation, et al*, 720 F.3d 644, 647 (7th Cir. 2013). In *Midwest Generation*, the Seventh Circuit rejected the EPA’s argument that certain Clean Air Act (CAA) New Source Review (NSR) air permitting violations should be considered “ongoing” violations and therefore, not be subject to the five-year statute of limitations applicable to the agency’s enforcement actions. Under the NSR regulations, existing facilities that undergo “major” modifications must obtain a special permit and meet stringent emission control requirements. EPA had fined Midwest Generation for violating the NSR regulations after the agency found the facility (under previous ownership) had implemented modifications between 1994 and 1999 without the required permits. The Seventh Circuit’s decision will now stand because DOJ failed to file a petition before the December 20 deadline. However, the DOJ still has until March 12 to file a petition seeking review of a similar decision from the U.S. Court of Appeals for the Third Circuit, which also rejected EPA’s NSR “on-going violation” argument in *United States, et al. v. EME Homer City Generation LP, et al.*, Nos. 11-4406, 11-4407, 11-4408.
- **Petitioners Ask D.C. Circuit to Vacate EPA Rule Allowing Backup Stationary Generators to Run Without Emission Controls.** A combination of state, environmental, and industry petitioners filed two sets of briefs in the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) on December 26 asking the court to vacate a 2013 EPA rule allowing backup stationary engines to run for up to 100 hours without otherwise-required emission controls if they are providing emergency demand response services. The 2013 rule revised standards for reciprocating international combustion engines, which are used in a range of industrial facilities. The 2013 rule increased the exempted period from 15 hours to 100 hours. In the two briefs, the petitioners argued that the emergency exemption violates the CAA and would complicate state efforts to meet National Ambient Air Quality Standards for ozone and PM. The case is *Del. Dep’t of Natural Res. & Env’tl. Control v. EPA*, D.C. Cir., No. 13-1093.

If you have questions about topics covered in this Update, please contact Kyle Danish at kwd@vnf.com.

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